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I. INTRODUCTION

On March 31, 1978, the United Nations Conference on the Carriage of Goods by Sea adopted the Hamburg Rules to replace the Hague Rules of 1924 as the guiding instrument on international carriage of goods by sea. The United States has signed but not yet ratified the new rules. The new rules embody several changes in the liability for cargo damaged or lost in transit by sea. This note will focus on the two most important substantive changes: The elimination of the so-called "catalogue of exemptions,"[1] and the change in the maximum liability limitation.[2]

An evaluation of the new rules in light of the current status of the United States law leads to the conclusion that the new rules should be ratified. Nevertheless, the new rules are not without problems. Ambiguity in the language of one provision in particular may warrant some modification.[3] In other areas, the rules do not go quite far enough.[4]

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* I would like to add a special thanks to Mr. Thomas McCune of the law firm of Lillick, McHose & Charles, for serving as my advisor on this note. The conclusions, however, are all my own.

1. Carriage of Goods by Sea Act, § 4(2) (a)-(q), 46 U.S.C. § 1304(2) (a)-(q) (1976) [hereinafter cited as COGSA].

2. COGSA, *supra* note 1, at § 4(5), 46 U.S.C. § 1304(5) (1976). Less significant statutory changes are not discussed in this article. The most frequently mentioned of these changes involve the time bar, "deviation," deck cargo and the time period of coverage. For an explanation of these concepts *see* Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea*, 7 J. MAR. L. & COM. 69-125, 327-50, 487-503, 615-70 (1975-76), 8 J. MAR. L. & COM. 167-94 (1976-77). The economic question of insurance is frequently mentioned. *See generally* Kimball, *Shipowner's Liability and the Proposed Revision of the Hague Rules*, 7 J. MAR. L. & COM. 217, 221 (1975-76).

3. *See* the discussion of the provision extending coverage beyond the tackle-to-tackle period at text accompanying note 114. Modification of the Hague Rules is, however, unlikely because it is a multilateral treaty.

4. *See* the discussion of the fire exemption at text accompanying notes 66-68.

But in general the rules are a remarkable achievement for a multilateral agreement hammered out through years of complex negotiation. In considering the analysis below, the reader should keep in mind (1) the problems with the current rules, (2) the extent to which ratification will change the current law, and (3) the effect of these changes, especially in relation to the abandonment of the much litigated terms of art.

Both the Hague Rules and the Hamburg Rules seek to answer the critical question: who bears the loss when goods are damaged or lost?[5] The history of United States resolution of this question is outlined in the following discussion.

A. The Current United States Law on Carriage of Goods by Sea

The responsibility for risk of loss has changed throughout United States history, ranging from absolute carrier liability in the early nineteenth century to a system of fault liability with numerous carrier exemptions today. These exemptions relieve carriers from liability for employee negligence in certain situations. At common law, the only exception to absolute carrier liability was loss caused by an act of God, the public enemy, inherent vice of the goods, or the fault of the shipper. These exceptions operated only in the absence of carrier negligence.[6]

With the growing use of the bill of lading in the middle nineteenth century carriers began to contractually exempt themselves from liability,[7] including exemption from liability for their own negligence.[8] The contractual dissipation of common law liability resulted in a basic shift in responsibility for damaged goods from the carrier to the shipper.

The British and American courts differed in their attitude towards negligence exemptions. The British courts favored the carrier and generally upheld negligence exemptions,[9] but the American courts refused to enforce such clauses as contrary to public policy.[10] American courts held such contractual exemptions to be subject to two overriding obli-

5. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 139 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

6. *Id.* at 139; Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7, 23 (1859); Clark v. Barnwell, 53 U.S. (12 How.) 272, 279-80 (1851).

7. GILMORE & BLACK, *supra* note 5, at 140.

8. *Id.* at 142.

9. *In re* Missouri S.S. Co., 42 Ch. D. 321 (1889); The Xanthos, 12 A.C. 503, 515 (1887); Chartered Mercantile Bank v. Netherlands India Steam Navigation Co., 10 Q.B.D. 521 (1882); Peninsular & Oriental Steam Navigation Co. v. Shand, 3 Moo P.C. (N.S.) 272 (1865); GILMORE & BLACK, *supra* note 5, at 142.

10. Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 438-63 (1889); New Jersey Steam Navigation Co. v. Merchant's Bank, 47 U.S. (6 How.) 344 (1848); The Energia, 56 F. 124, 126-27 (S.D.N.Y. 1893); GILMORE & BLACK, *supra* note 5, at 142.

gations. The first obligation was to use "due care" with respect to the cargo, and the second was to exercise "due diligence" to furnish a "seaworthy" ship at the beginning of the voyage.[11] The difference between American and British law emphasized the basic tension between carrier and shipper interests. In the middle nineteenth century, Britain was largely a carrier nation while American interests predominately favored the shipper.[12]

The Harter Act,[13] enacted in 1893, represented an American compromise between these competing interests.[14] The Harter Act codified the pro-shipper approach of American common law, retaining the "over-riding obligation" of the carrier to exercise "due diligence" in providing a seaworthy ship and "due care" with respect to cargo.[15] Yet the Harter Act favored carrier interests as well, creating the "management or navigation" exemption. This exemption relieved the carrier from liability for damage to cargo due to negligence in the "management or navigation" of the vessel.[16]

The Hague Rules, modeled largely after the Harter Act, were adopted in an international convention in 1924.[17] The United States ratified the Hague Rules twelve years later in the Carriage of Goods by Sea Act (COGSA).[18]

COGSA continues the Harter Act compromise between carrier and cargo interests. COGSA imposes on the carrier the overriding obligation to exercise "due diligence" in providing a seaworthy ship and "due care" with respect to cargo.[19] COGSA continues the "navigation or management" exemption.[20] COGSA also codifies several other ex-

11. GILMORE & BLACK, *supra* note 5, at 140.
12. *Id.* at 142.
13. 46 U.S.C. §§ 190-96.
14. GILMORE & BLACK, *supra* note 5, at 143.
15. Harter Act §§ 1-2, 46 U.S.C. §§ 191-92 (1976).
16. *Id.* § 192.
17. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter cited as the Hague Rules]. For the official United States translation *see* A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 41 (4th ed. 1953). About 80% of the world's seaborne trade is carried on vessels subject to the Hague Rules. Sassoon, *Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons*, 3 J. MAR. L. & COM. 759, 760 (1972).
18. COGSA, *supra* note 1 at §§ 1-15, 46 U.S.C. §§ 1300-15 (1976). Though COGSA was enacted in 1936, actual ratification of the Hague Rules occurred in 1937. The United States announced that in the event of a conflict between the enacting legislation (COGSA) and the Hague Rules text, the former would prevail. A. KNAUTH, *supra* note 17, at 77. For a discussion of the conflicts *see* GILMORE & BLACK, *supra* note 5, at 165, 172, 185-86.
19. COGSA, *supra* note 1, at § 3, 46 U.S.C. § 1303 (1976).
20. *Id.* § 4(2)(a), 46 U.S.C. § 1304(2)(a) (1976).

emptions,[21] the most important being the fire exemption.[22] The fire exemption relieves the carrier of liability for damage caused by fire.[23] Like the "navigation or management" exemption, the fire exemption relieves the carrier in some cases from liability for crew negligence. The other carrier exemptions under COGSA are not as significant as the aforementioned since they would generally be available in cases of non-negligence.

Departing from the Harter Act pattern, COGSA limits a carrier's liability for goods lost or damaged in transit to five hundred dollars per package or customary frieght unit.[24] Within this scheme, the definition of package has been intensively litigated.

COGSA applies only to international shipping. The Harter Act, where not preempted by COGSA, applies to international and domestic shipping.[25] Developments in United States shipping law have been confined to judicial interpretation of these two statutes since the enactment of COGSA.[26]

B. The Hamburg Rules

Concern that the Harter Act compromise, which exempts carriers from liability for certain types of crew negligence, favored carrier over

21. *Id.* § 4(2)(c)-(q), 46 U.S.C. § 1304(2)(c)-(q) (1976).

22. *Id.* § 4(2)(b), 46 U.S.C. § 1304(2)(b) (1976).

23. This exemption was not new to United States law. A statute relieving the carrier from liability for fire damage had been enacted in 1851 and the same statute is still in force today concurrently with the COGSA fire exemption. *See* Fire Statute, 46 U.S.C. § 182 (1976).

24. COGSA, *supra* note 1, at § 4(5), 46 U.S.C. § 1304(5) (1976).

25. *See* GILMORE & BLACK, *supra* note 5, at 145-47 for an explanation of the scope of COGSA and the Harter Act. The Harter Act is superceded in areas specifically covered by COGSA (*id.* at 147) but is still applicable to the time period prior to cargo delivery and following discharge. I. HALL, M. KATZMAN & A. SANN, 2a BENEDICT ON ADMIRALTY § 14 (7th ed. 1977) [hereinafter cited as BENEDICT ON ADMIRALTY.]

26. Internationally, the Hague-Visby Protocol amending the Hague Rules was adopted in 1968. Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Feb. 23, 1968, reported in *Bills of Lading*, Report by UNCTAD Secretariat, U.N. Doc. TD/B/C.4ISL/6/Rev. 1 (1971). The Hague-Visby Protocol became operative with the ratification of 10 nations on June 23, 1977: Denmark, Ecuador, France, Lebanon, Norway, Singapore, Sweden, Switzerland, Syria, and United Kingdom. *The Hague-Visby Rules Now Operative in United Kingdom*, 4 LLOYDS MAR. & COM. L.Q. 512 (1977). The United States is not a signatory.

The Hague-Visby Protocol makes substantive changes in the area of limitation of liability but it still retains the basic Harter Act compromise embodied in the carrier exemptions. Major changes embodied in the Visby Protocol include increasing the liability limitation, defining "package" and extending the carrier's defenses and liability limitations to include the "servants or agents" of the carrier. *Id.* at 512.

shipper interests led to the adoption of the Hamburg Rules.[27] The Hamburg Rules make the carrier liable for crew negligence by eliminating the carrier liability exemptions.[28] Otherwise, the Hamburg Rules continue a negligence liability regime.[29] Liability is limited in a manner similar to COGSA's liability limitation. The Hamburg Rules, however, provide a new approach for determining maximum liability, which avoids the problem of defining a package.

II. THE EXEMPTIONS

The elimination of the navigation or management exemption[30] and the fire exemption[31] under the Hamburg Rules shifts to the carrier substantial responsibility for lost or damaged goods.[32] Without the

27. In 1970 the U.N. Conference on Trade and Development (UNCTAD) published a report entitled *Bills of Lading* which was the genesis of the effort to reform the liability regime for carriage of goods by sea. *Bills of Lading*, *supra* note 26. This report recognized that the current liability regime placed an inordinate burden on cargo interest, a burden which proved particularly onerous for developing nations. *Id.* at 19-29. The carrier exemptions which are peculiar to sea carriage of goods and the ambiguities which exist in the Hague Rules were identified as the main grounds of concern. *Id.* at 73. UNCTAD referred to the U.N. Commission on International Trade Law (UNCITRAL) its proposals to reform the Hague Rules. UNCITRAL completed a new draft convention in 1975, and it adopted a final draft at its ninth session in May 1976. For the text of this draft *see* 8 J. MAR. L. & COM. 267. The U.N. Conference on the Carriage of Goods by Sea adopted this draft with some minor modifications in March 1978. United Nations Convention on the Carriage of Goods by Sea, 1978 A.M.C. 1036 (1978) [hereinafter cited as Hamburg Rules]. As of November 21, 1979, 27 nations have signed the Convention: Austria, Brazil, Czechoslovakia, Chile, Denmark, Egypt, Ecuador, Federal Republic of Germany, Finland, France, Ghana, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, Philippines, Portugal, Vatican, Senegal, Sierra Leone, Singapore, Sweden, Venezuela, United States (April 20, 1979), and Zaire. Only Egypt has ratified the Convention. Uganda and Tanzania have become parties by accession.

28. Hamburg Rules, *supra* note 27, at art. 5(1). "The Carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the *carrier proves* that *he, his servants or agents* took all measures that *could reasonably be required* to avoid the occurrence and its consequences." (emphasis added). It is arguable that absolute liability would better achieve the UNCTAD objective and provide greater certainty but that appears politically impossible.

29. These exemptions, the "navigation or management" defense and the fire exemption, are at the heart of the Harter Act compromise. *See* text accompanying notes 19-20.

30. COGSA, *supra* note 1, at § 4(2)(a), 46 U.S.C. § 1304(2)(a) (1976).

31. *Id.* § 4(2)(b), 46 U.S.C. § 1304(2)(b) (1976).

32. The Hamburg Rules also eliminate the other COGSA liability exemptions. *Id.* § 4(2)(c)-(q), 46 U.S.C. § 1304(2)(c)-(q) (1976). Since the other COGSA liability exemptions are not available if the damage is caused by carrier negligence their elimination under the basic negligence liability regime of the Hamburg Rules should not effect any major change; if the carrier is not negligent it will not be liable with or without the other exemptions and if the carrier's negligence is the cause of damage it is liable regardless of the exemptions. The

protection of these two exemptions, the carrier is responsible for crew negligence. Their elimination also lends greater certainty to the economic relations involved. By avoiding the statutory uncertainty associated with the exemptions, the carrier and shipper can determine where the risks lie in advance of a voyage. Certainty is especially important in this area to reduce duplicative insurance coverage. A critical analysis of the navigation or management exemption and the fire exemption follows.

A. The Navigation or Management Exemption

Under the Harter Act and COGSA, the carrier must exercise "due diligence" to provide a seaworthy vessel and "due care" in relation to cargo.[33] Yet the carrier is exempted from liability for damage to cargo caused by negligent navigation or management of the vessel.[34]

In applying the law, the courts have a twofold task: first, the court must determine whether the carrier exercised "due diligence" in initially providing a seaworthy vessel. If the first question is answered affirmatively the court will then determine whether cargo damage resulted from negligence in the navigation or management of the vessel or from negligence in the care of cargo. These two questions have been troublesome for the courts in applying both COGSA and the Harter Act.[35] Seemingly similar fact situations have led courts to inconsistent

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burden of proof under the Hamburg Rules is generally on the carrier. Similarly, in order to gain other exemptions under COGSA, the carrier has the burden of establishing its own lack of negligence. The burden of proof rests with the carrier for all of the exemptions except where the carrier has shown that the loss was caused by the overwhelming force of third persons, the fault of the shipper, or the attempt to save life or property. GILMORE & BLACK, *supra* note 5, at 185. *See also* 2A BENEDICT ON ADMIRALTY, *supra* note 25, at 2-14. Cases interpreting the current rules on this negligence question will be useful for a court applying the new Hamburg Rules.

33. Harter Act, § 1, 46 U.S.C. § 191 (1976); COGSA, *supra* note 1, at § 3, 46 U.S.C. § 1303(1)-(2) (1976).

34. Harter Act, § 3, 46 U.S.C. § 193 (1976); COGSA, *supra* note 1, at § 4(2)(a), 46 U.S.C. § 1304(2)(a) (1976).

35. Case law interpreting the Harter Act and COGSA is essentially interchangeable. The principal difference is the Harter Act's requirement of seaworthiness as a condition precedent to the enjoyment of any liability exemption. The Isis, 290 U.S. 333 (1933); Alaska Native Industries Coop. Ass'n v. United States, 206 F. Supp. 767, 771, 772 (W.D. Wash. 1962); GILMORE & BLACK, *supra* note 5, at 155-56; Note, 13 WM. & MARY L. REV. 638, 640 (1972). There is no such condition precedent under COGSA which allows the exemptions as long as the unseaworthiness is not causally related to cargo damage. California & Hawaiian Sugar Co. v. Columbia Steamship Co., 510 F.2d 542, 543 (5th Cir. 1975); Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422, 432 (5th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969); Firestone Synthetic Fibers Co. v. M/S Black Heron, 324 F.2d 835-36 (2d Cir. 1963). However, where there is more than one effective cause including unseaworthiness, the fact that

results in assigning liability for damaged cargo.[36]

1. The Seaworthiness Question.

Seaworthiness is determined only at the beginning of the voyage.[37] Problems in applying the law have been generated by (1) the absence of a clear standard for seaworthiness and (2) by the tendency of the courts to take an expansive view of unseaworthiness to prevent unjust results.

The Supreme Court has laid down the "general rule" that each case must be decided on its facts.[38] This rule effectively provides no test for seaworthiness, leading to disparate results in similar fact settings. For example, consider two cases where a ship's crew left ports open. In one case, a burlap cargo was damaged by seawater because the ship's ports were unknowingly left open. The court held that the ship was unseaworthy.[39] In the second case, cargo was damaged when the crew negligently failed to close the ports during a storm at sea.[40] The ports had been intentionally left open upon departure. The ship was deemed to be seaworthy, a finding which relieved the carrier of liability.

Similarly, cases where damage to cargo was caused by putting water in the wrong hold have had disparate results. In one case, cargo was damaged when a crewman mistakenly stuck a fire hose into the wrong sounding pipe.[41] This was done because the ship lacked adequate identification on and around pipe caps, a condition the court found to constitute unseaworthiness. In the second case, damage was

one cause is exempted under COGSA does not eliminate the carrier's responsibility for unseaworthiness. Orient Mid-East Lines v. Shipment of Rice on Board S.S. Orient Transporter, 496 F.2d 1032, 1041 (5th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); Spencer Kellogg & Sons v. Great Lakes Transit Corp., 32 F. Supp. 520, 531-32 (E.D. Mich. 1940).

36. *See* note 55 *infra* for discussion.

37. The Calendonia, 157 U.S. 124, 133, 134 (1895); The Edwin I. Morrison, 153 U.S. 199, 210 (1894); The Steel Navigator, 23 F.2d 590 (2d Cir. 1928) (L. Hand). The burden of proof to show unseaworthiness at the beginning of the voyage is on the cargo owner. The burden of proof arises as follows: First, the cargo owner shows his goods were damaged. Second, the carrier establishes the navigation or management exemption. Third, the burden is shifted to the cargo owner to show unseaworthiness at the beginning of the voyage. Director General of India Supply Mission v. The Maru, 459 F.2d. 1370-72 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); Kimball, *supra* note 2, at 226. Fourth, the carrier can escape liability by proving its exercise of due diligence. Mississippi Shipping Co. v. Zander & Co., 270 F.2d 345 (5th Cir. 1959), *vacated as moot*, 361 U.S. 115 (1959). For a discussion of the burden of proof see Kimball, *supra* note 2, at 226.

38. International Navigation Co. v. Farr & Bailey Mfg. Co., 181 U.S. 218, 224 (1901).

39. *Id.* at 224-25.

40. The Silva, 171 U.S. 462, 465 (1898).

41. Hydaburg Coop. Ass'n v. Alaska Steamship Co, 404 F.2d 151 (9th Cir. 1968).

caused by the crew ballasting with water into a tank containing cargo rather than the intended empty tank.[42] The court held this to be an error in management within the exemption relieving the carrier of liability. Technical distinctions of this kind have been followed in numerous other cases over the years.[43] In most of these cases, the damage was caused by crew negligence. Similar instances of crew negligence should not warrant such varied results.[44]

Discomfort with the management or navigation exemption, which is inconsistent with modern views of respondeat superior,[45] has encouraged the courts to take an expansive view of unseaworthiness. In one case, the Supreme Court determined unseaworthiness of a ship, engaged in a long voyage, at an intermediate port.[46] This decision was a deviation from the usual rule that unseaworthiness be determined at the beginning of the voyage. The rationale for this deviation was that the carrier's port manager had occasion to examine the vessel at the intermediate port following a stranding incident. Unseaworthiness has also frequently been expanded to include an inadequate[47] or incompe-

42. Firestone Synthetic Fibers Co. v. M/S Black Heron, 324 F.2d 835 (2d Cir. 1963). Ballasting is to fill a hold in the ship so as to give the ship greater stability. WEBSTERS NEW COLLEGIATE DICTIONARY (1976).

43. *See, e.g.*, The Aakre, 122 F.2d 469 (2d Cir. 1941), *cert. denied*, 314 U.S. 690 (1941) (ship stranded because old chart on board did not show position of bouy but found seaworthy because crew could have discovered it easily); The President Polk, 43 F.2d 695 (2d Cir. 1930); The Steel Navigator, 23 F.2d 590, 592 (2d Cir. 1928) (failure to make fast manhole covers before filling after peak with water did not make the ship unseaworthy unless it was apparent before leaving port that the water ballast would be necessary in route); The Oritani, 40 F.2d 522 (E.D. Pa. 1929); The Yungay, 58 F.2d 352 (S.D.N.Y. 1931).

44. It can be argued that the facts in the above cases are technically distinguishable and that a lawyer can reasonably predict liability in most cases. Even if this is true it seems that the presence of such fine distinctions in an adversary system only serve to generate higher costs in the settlement process.

45. *See* RESTATEMENT (SECOND) OF AGENCY §§ 212-49 (1958); W. PROSSER, THE LAW OF TORTS 460 (4th ed. 1971).

46. The carrier was held liable for the lack of "due diligence" to provide a seaworthy vessel although the ship had been seaworthy upon departure from the original port. The Isis, 290 U.S. 333 (1933). This situation should be distinguished from the concept of "seaworthiness by stages." "Seaworthiness by stages" applies where the carrier plans to refuel at intermediate ports. The question as to the carrier's seaworthiness with respect to fuel is asked at each port for the leg to follow, *e.g.*, The Glymont, 66 F.2d 617, 619 (2d Cir. 1933). This latter theory is based on practical considerations and is not expansive since it allows the carrier to depart from the original port without carrying the full amount of fuel to complete the entire voyage. The Steel Navigator, 23 F.2d 590, 592 (2d Cir. 1928) (L. Hand; dictum).

47. Waldron v. Moore-McCormack Lines, 386 U.S. 724, 727 (1967); Orient Mid-East Lines v. Shipment of Rice on Board S.S. Orient Transporter, 496 F.2d 1032, 1040 (5th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1974); Aguiree v. Citizens Casualty Co., 441 F.2d 141, 144 (5th Cir. 1971), *cert. denied*, 404 U.S. 829 (1971); Slaughter v. S.S. Ronde, 390 F. Supp. 637, 647 (S.D. Ga. 1974).

tent[48] crew. Saying that seaworthiness included the reasonable expectation of completing the voyage, one case went so far as to find a ship unseaworthy when a multitude of unsatisfied creditors had the power to arrest it at any time.[49]

This absence of a clear standard and the expansive approach to unseaworthiness have generated uncertainty in determining where the risks lie. Adoption of the Hamburg Rules would eliminate the navigation or management defense, reducing uncertainty and placing responsibility for crew negligence on the carrier.

2. The Care of Cargo Question.

Distinguishing acts of negligence in the "navigation or management of the vessel"[50] from acts of negligence in the "care and custody of cargo"[51] is problematic for the courts. Liability accrues to the carrier only for negligence in the care and custody of cargo. Since negligence in navigating and managing a cargo laden ship would also cause a forseeable risk to cargo, the two phrases seem to overlap.[52]

In *The Germanic*,[53] Justice Holmes established the "primary purpose" test to distinguish the two: "[T]he question which section is to govern must be determined by the primary nature and object of the acts which cause the loss." Justice Holmes stated, "If the primary purpose is to affect the ballast of the ship," the act is management of the vessel, "[b]ut if . . . the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make [it] the less" a case of negligence in the care of cargo.[54] The "primary purpose" test has been applied in virtually all subsequent cases with inconsistent results.[55]

48. Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422, 432 (5th Cir. 1968), *cert. denied*, 394 U.S. 943 (1968); The Vale Royal, 51 F. Supp. 412, 426 (D. Md. 1943). A pilot's lack of knowledge of the precise figures for the turning radius of a ship was not sufficient by itself to establish an incompetent crew. *In re* Grace Lines, Inc., 397 F. Supp. 1258 (S.D.N.Y. 1973), *aff'd*, 517 F.2d 404 (2d Cir. 1975).

49. Morrisey v. S.S.A. & J. Faith, 252 F. Supp. 54 (N.D. Ohio 1965).

50. COGSA, *supra* note 1, at § 4(2)(a), 46 U.S.C. § 1304(2)(a) (1976).

51. *Id.* § 3(2), 46 U.S.C. § 1303(2) (1976).

52. Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d 361, 374 (9th Cir. 1974) (Carter, J.).

53. The Germanic, 196 U.S. 589 (1906).

54. *Id.* at 597.

55. For example: (1) Damage caused by failure to ventilate or refrigerate the cargo properly results in carrier liability for negligence in the care of cargo. Schnell v. The Vallescura, 293 U.S. 296 (1934) (failed to ventilate a cargo of onions en route). Vana Trading Co. v. S.S. "Mette Skou," 556 F.2d 100 (2d Cir. 1977), *cert. denied*, 434 U.S. 892 (1977); United States v. Lykes Bros. Steamship Co., 511 F.2d 218 (5th Cir. 1975) (the strike exemption did

The allocation of legal responsibility for damaged cargo should not be based on so artificial a distinction. Liability should follow control and control rests with the carrier employing the crew. Adoption of the Hamburg Rules not only eliminates a source of confusion but also makes liability consistent with modern tort principles.

3. Collisions and "Both to Blame" Clauses.

Elimination of the navigation or management defense gives rise to special considerations in cases where two vessels collide. In such cases, even though the collision is due to the carrying vessel's error in navigation, that carrying vessel may indirectly be held liable for part of the damage to its own cargo. This result, unique in navigation law, is due to the United States law on joint and several liability. A cargo owner can bring suit against the non-carrying vessel, and thereby avoid its own carrier's navigation or management defense.[56] However, if the non-carrying vessel is held liable for loss of cargo carried on the other

not relieve carrier of duty to care for cargo); Campagnie De Navigation Fraissinet et Cyprien Fabre, S.A. v. Mondial United Corp., 316 F.2d 163 (5th Cir. 1963); Daido Line v. Thomas P. Gongalez Corp., 299 F.2d 669 (9th Cir. 1962); Barr v. International Mercantile Marine Co., 29 F.2d 26 (2d Cir. 1928) (failed to refrigerate cargo of pears). In *Vana Trading*, the court refused to apportion the damage even though the shipper's own inadequate packing was a concurrent cause of the non-ventilation. The navigation exemption has been allowed when the carrier's negligence in maintaining its course through a storm resulted in sweat damage caused by inadequate ventilation. Hershey Chocolate Corp. v. The Mars, 172 F. Supp. 321 (E.D. Pa. 1959).

(2) Damage caused by improper ballasting is generally held to be negligence in the management or navigation of the vessel thereby relieving the carrier of liability. General Foods Corp. v. The Mormacsurf, 276 F.2d 722 (2d Cir. 1960), *cert. denied*, 364 U.S. 822 (1960); Leon Bernstein Co. v. Wilhelmsen, 232 F.2d 771 (5th Cir. 1956). One case held, however, that an officer's improper ballasting before the voyage rendered the carrier liable under the seaworthiness test. American Mail Line v. United States, 377 F. Supp. 657 (W.D. Wash. 1974). In another case, the court found negligent cargo care when a master mistakenly directed the discharge of cargo from the after end of a barge allowing the bow to sink and seawater to reach the cargo. The Joseph J. Hock, 70 F.2d 259 (2d Cir. 1934).

(3) Conversely, the court held in *The Milwaukee Bridge* that the master's failure to inspect the hold after discovering leaking drums of sulphuric acid that ultimately damaged a cargo of flour constituted negligent management rather than negligent care of cargo. The Milwaukee Bridge, 26 F.2d 327 (2d Cir. 1928). In still another case, the Supreme Court denied the management defense when wool was stored near a non-watertight bulkhead and damaged by wet sugar stored aft of the bulkhead. The offloading of other cargo had caused the vessels trim (balance) to shift and the liquid from the sugar to run into the compartment where the wool was stowed. Knott v. Botany Worsted Mills, 179 U.S. 69 (1900); *see also* Armco Int'l Corp. v. Rederi A/B Disa, 151 F.2d 5 (2d Cir. 1945) (leaking acid drum constituted negligence); General Foods Corp. v. The Troubador, 98 F. Supp. 207 (S.D.N.Y. 1951) (carrier held liable for improper loading of wet ores and dry coffee in the same hold).

56. The Chattahoochee, 173 U.S. 540 (1899); The Alabama and the Gamecock, 92 U.S. 695 (1875).

vessel involved in a collision, it is entitled to contribution from the carrying vessel for that loss.[57] This results in a carrier's liability for damage to its own cargo even though the damage was caused by that carrier's error in navigation of the vessel.

Carriers sought to avoid this result by using "both to blame" clauses in the bill of lading. The clauses required the cargo owner to indemnify the carrier for any indirect liability for damage to its own cargo in collision cases. "Both to blame" clauses have been held invalid as against public policy by the Supreme Court.[58]

The American courts have thus carved out an indirect exception to the navigation or management defense. As a result, adoption of the Hamburg Rules would not significantly change the liability for damage to cargo in collision cases.[59]

4. *Conclusions In Regard to the Navigation or Management Exemption.*

Overall, the management or navigation defense is a concept whose time has passed. It dates from the days when a voyage was essentially a joint venture between ship and cargo.[60] Today this is no longer the case. Survival of the exemption violates principles of respondeat superior and gives rise to fine distinctions with little economic or logical significance.

B. The Fire Exemption

Arguments for eliminating the fire exemption are similar to those for eliminating the navigation or management defense: inconsistency with modern tort principles, and uncertainty in statutory interpretation. Allowing the carrier to escape liability for damage to cargo caused by negligence of the crew in starting a fire clearly conflicts with principles of respondeat superior. The exception to the general rule of respondeat superior is even broader under the fire exemption than under the navigation or management exemption because the carrier will be relieved of

57. United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

58. United States v. Atlantic Mutual Insurance Co., 343 U.S. 236 (1952).

59. This is not true if the non-carrying vessel is lost. For a more detailed analysis of liability in collision cases *see* Kosanin, *Cargo Rights and Responsibilities in Collision Cases*, 51 TUL. L. REV. 880 (1976-77).

60. Diamond, Q.C., *The Division of Liability as Between Ship and Cargo (Insofar as It Affects Cargo Insurance Under the New Rules Proposed by UNCITRAL)*, 4 LLOYD'S MAR. & COM. L.Q. 39, 48-49 (1977). During the drafting of the Hamburg Rules, the U.S. delegation proposed elimination of the navigator or management exemption. Sweeney, *supra* note 2, at 109.

liability even if a crewman's negligent act in starting a fire was in pursuit of the duty to care for cargo.[61] As with the navigation or management defense, however, the courts have narrowly defined the fire exemption. A carrier has even been held liable for failure to *put out* a fire after being notified of its existence, though the fire had been started by a crewman while the ship was at sea.[62] A carrier is generally responsible for fire damage originating in failure to exercise "due diligence" to provide a seaworthy vessel.[63]

Uncertainty in application troubles the fire exemption as it does the navigation or management exemption. Two statutory fire exemptions with totally different language compound the problem: (1) The Fire Statute, enacted in 1851, relieves the owner of a vessel of liability for damage caused by fire "*unless* such fire is caused by the design or neglect of such owner" (emphasis added);[64] (2) COGSA article 4(2)(b) relieves a carrier of liability for damage caused by fire "*unless* caused by the actual fault or privity of the carrier" (emphasis added).[65] While failure to exercise due diligence to provide a seaworthy vessel is generally considered the "actual fault or privity of the carrier,"[66] it may not

61. This "care of cargo" loophole that expands the scope of the fire exemption results from the language of the fire exemption: COGSA, *supra* note 1, at § 4(2)(b), 46 U.S.C.A. § 1304(2)(b) relieves the carrier of liability for damage resulting from fire, "unless caused by the actual fault or privity of the carrier." The Fire Statute, 46 U.S.C. § 182, which dates back to 1851, simultaneously provides a fire exemption in cases not covered by the COGSA fire exemption. The Fire Statute relieves the *owner* of the ship from liability for cargo damage resulting from fire, "unless such fire is caused by the design or neglect of such owner." The confusion caused by the different language of these two provisions is discussed in the text.

62. American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co., 270 F.2d 499, 501 (9th Cir. 1959). The court felt the Fire Statute and COGSA should be interpreted in the same way. *Id.* at 501. The carrier in that case was denied the fire exemption because of its negligent failure to use carbon dioxide to *put out* the fire when first notified of smouldering cargo. *See also* Petition of Isbrandtsen, 201 F.2d 281 (2d Cir. 1953); Gesellschaft Fur Getreidenhandel Ag. v. S.S. Texas, 318 F. Supp. 599 (E.D. La. 1970).

63. *See* exceptions discussed within the context of this article.

64. 46 U.S.C. § 182 (1976). In a subsequent section, this exemption is extended to a demise charter as well. 46 U.S.C. § 186 (1976).

65. COGSA, *supra* note 1, at § 4(2)(b), 46 U.S.C. § 1304(2)(b) (1976).

66. The familiar duty as to seaworthiness is therefore imposed under the COGSA fire exemption. *In re* Liberty Shipping Corp., Motor Ship Don Jose Figueras, 509 F.2d 1249 (9th Cir. 1975) (unseaworthiness due to incompetent crew); Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669 (2d Cir. 1973); Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc. 403 F. Supp. 562, 567 (S.D.N.Y. 1975) ("the duty to provide a seaworthy ship is a non-delegable duty"). In *Asbestos Corp.*, the court held that unexcusable unseaworthiness "which in fact causes the damage . . . will exclude the shipowner from the exemption." Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 672 (2d Cir. 1973).

be considered the "design or neglect" of the "owner."[67] Some courts have been willing to give the term "carrier" under COGSA a broader application than the term "owner" under the Fire Statute. In *Earle and Stoddart v. Ellerman's Wilson Line*, the Supreme Court construed the Fire Statute, holding that the damage must be caused *directly* by the vessel's owner before the fire exemption will be denied.[68] This suggests that the owner (or a high corporate officer in the case of a corporate owner) must have caused the fire himself before the fire exemption will be denied that owner under the Fire Statute's "unless clause." Under this view, the fire exemption in the Fire Statute is much broader than the fire exemption in COGSA which can be denied when the shipper makes a showing of unseaworthiness at the beginning of the voyage. Other courts treat the fire exemption under the Fire Statute and COGSA identically.[69] This confusion and excessive complexity could be eliminated by omitting the fire exemption.

The fire exemption has been partially eliminated by the Hamburg Rules. The elimination is less than total in that the Hamburg Rules single out fire damage through a special provision shifting the burden of proving carrier negligence.[70] Under the Hamburg Rules, there is a

67. *See* note 68 *infra*.

68. Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd., 287 U.S. 420 (1932) (Brandeis, J.). The ship's chief engineer was negligent in putting a new supply of coal on top of the existing supply which subsequently overheated, causing a fire. *See also* Consumers Import Co. v. Kabushiki K.K. Zosenjo, 320 U.S. 249 (1943); Hershey Chocolate Corp. v. S.S. Luckenbach, 184 F. Supp. 134 (D. Ore. 1960) (interpreting the Fire Statute, *supra* note 23). This broader interpretation seems to have been restricted to cases applying the fire statute. Sweeney, *supra* note 2, at 106, n.87. It is generally an onerous burden for cargo owners to prove the owners' "design or neglect" under the Fire Statute and cargo owners will not recover when the origin of the fire is a matter of speculation. *In re* G.B.R.M.S. Caldas, 350 F. Supp. 566 (E.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973).

69. American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co., 270 F.2d 499, 501 (9th Cir. 1959).

70. Hamburg Rules, *supra* note 27, at art. 5(4):

(a) The carrier is liable:
   (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
   (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

general presumption against the carrier for lost or damaged goods.[71] In the case of fire damage, the presumption does not obtain and the burden shifts to the cargo owner to prove the negligence of the "carrier, his servants or agents."[72] Such a provision remains consistent with current rules which also place the burden of proving negligence in causing fire damage on the cargo owner.[73]

Imposing this onerous burden on the cargo owner, however, is impractical. Principles of evidence generally place the burden of proof on the party having the best access to evidence, the carrier in this case. Although the new rules make a substantial improvement by eliminating the fire exemption, they do not go far enough.

III. THE LIMITATION OF LIABILITY

The Hamburg Rules attempt to solve two major problems relating to the provisions limiting the carrier's liability for lost or damaged goods. First, they define the term "package" for purposes of the package limitation. Second, they extend the carrier's liability limitation to the carrier's agents in performance of the contract of carriage, a protection traditionally attempted through contract with a "Himalaya" clause.[74]

A. What Is a Package?

The definition of "package" gains importance because the provision in COGSA § 4(5) limits the carrier's liability for lost or damaged goods to "$500 per package . . . , or in case of goods not shipped in packages, per customary freight unit."[75] Modern container freight

71. *Id.* art. 5(1). For text of provision *see supra* note 28.

72. *See supra* note 70.

73. Under the COGSA navigation or management defense, if the cargo owner proves the vessel unseaworthy, then the burden of proof shifts to the carrier. Under the COGSA Fire Exemption, the cargo owner must prove unseaworthiness and must also prove the "carrier" or the "owner" of the vessel failed to exercise due diligence to make it seaworthy. Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 672-73 (2d Cir. 1973); Hanson & Orth, Inc. v. M/V Jalatarang, 450 F. Supp. 528 (S.D. Ga. 1978).

74. The "Himalaya Clause" derives its name from Adler v. Dickson (The Himalaya) (1955) 1 Q.B. 158 (1954), 1 Lloyd's List L.R. 315, where the House of Lords held that for carriage of passengers and goods the law permitted the carrier to stipulate to application of the liability limitation both for itself and those it hired to carry out the contract. This decision induced carriers to begin drafting "Himalaya" clauses to benefit stevedores and others.

75. Section 4(5) of the Hague Rules, *supra* note 17, simply says "per package or unit." In both cases the limit applies "unless the nature and value of such goods have been declared by the shipper before shipment . . . ." COGSA, *supra* note 1, at § 4(5), 46 U.S.C. § 1304(5) (1976). A declaration of higher value under the "unless clause" is unlikely because it would cause higher freight rates.

shipping has challenged courts to determine whether the container or the individual units inside the container constitute the "package" for limitation purposes.[76] Since intermodal containers did not exist in the early part of this century when the COGSA package limitation was developed, legislative history is not helpful.[77]

Three conflicting methods of defining a "package" have evolved. Some commentators[78] and early cases in the Second Circuit,[79] consistent with the Hamburg Rules, favor looking to the enumeration on the bill of lading. This contractual emphasis places greater weight on the parties' intent.[80] In *Standard Electrica*, Chief Judge Lumbard emphasized that any other approach "would place upon the carrier the burden of looking beyond the information in the bill of lading or beyond the outer packing to investigate the contents of each shipment."[81]

In *Royal Typewriter v. M/V Kulmerland*, the Second Circuit departed from its earlier view and developed the "functional economics test."[82] This test involves two steps: first, the cartons inside the shipping container are presumed to be "packages" if they would be func-

76. BLACK'S LAW DICTIONARY (4th ed. rev. 1968) defines a package as "a bundle put up for transportation or commercial handling . . . ."

77. DeOrchis, *The Container and the Package Limitation—The Search for Predictability*, 5 J. MAR. L. & COM. 251 (1974). An intermodal container is one designed for easy transfer from ship to ship or from a ship to a land carrier.

78. *See* Tetley, Q.C., *Per Package Limitation and Containers Under the Hague Rules, Visby & UNCITRAL*, 4 DALHOUSIE L.J. 685 (1978). "[T]he key to determining what is a package or unit for purposes of limitation is the intention of the parties, particularly as declared on the bill of lading as prescribed by the rules." *Id.* at 688.

79. When the bill of lading listed the "number of packages" as "9 pallets" the court found that each pallet containing 6 boxes constituted a package. Standard Electrica S.A. v. Hamburg Sudamerikanische Dampfschifffahrts—Gesellschaft, 375 F.2d 943, 946 (2d Cir. 1967), *cert. denied*, 389 U.S. 831 (1967) [hereinafter cited as Standard Electrica]. Until 1973, Second Circuit cases seemed to comport fairly well with this view. In Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971), where the bill of lading identified the cargo as "1 container s.t.c. [said to contain] 99 bales of leather," the court held that each individual bale was a "package." Chief Judge Friendly considered a "package . . . more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object . . . in which the carrier caused them to be contained." *Id.* at 815. In Nichimen Co. v. M.V. Farland, 462 F.2d 319, 335 (2d Cir. 1972), Chief Judge Friendly determined that a coil of steel secured by metal bands is a package and stated that "[w]hile the description on the bill of lading is not controlling [citation omitted] it is important evidence of the parties' understanding . . . ."

80. Standard Electrica, *supra* note 79, at 946.

81. *Id.* at 947.

82. Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645, 648 (2d Cir. 1973). 350 cartons of adding machines were shipped in a container under a bill of lading describing the cargo as "one container said to contain machinery." The court held that there was one package, limiting the carrier's liability to $500. *Id.* at 646. The result would have been the same under the bill of lading approach but the court expressly established a new test. *Id.* at

tional for shipment overseas;[83] second, the parties can overcome the presumption by proving they intended otherwise.[84] This second step is consistent with the earlier Second Circuit approach. In the cases that have since applied *Kulmerland*, no party has overcome the presumption.[85]

A federal district court in Washington State has developed a third approach to defining a "package": the "plain, ordinary meaning" test. In *Matsushita Electris v. S.S. Aegis Spirit*,[86] Judge Beeks rejected both the "functional economics test" and the Second Circuit's old bill of lading test. He concluded instead that the term "package" is to be given its "plain, ordinary meaning" and not some "specialized or technical meaning."[87] If the cartons are packages in the ordinary sense before put into the carrier's container they do not lose that character afterwards.[88] Judge Beeks also concluded that the parties' intent has nothing to do with the meaning of the term "package"; ". . . it is not the parties' characterizations of the shipment, but the court's interpretation

648. Tetley asserts that the court would not have reached this result except for the fact that the bill of lading specified "one container." Tetley, *supra* note 78, at 701.

83. Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645, 648 (2d Cir. 1973). Otherwise they are presumed not to be "packages." A package is considered functional if it is suitable for shipment overseas without further modification.

84. *Id.* at 649.

85. Rosenbruch v. American Export Isbrandtsen Lines, Inc., 543 F.2d 967 (2d Cir. 1976), *cert. denied*, 429 U.S. 939 (1976) (the container of used household goods was the "package"); Cameco v. S.S. American Legion, 514 F.2d 1291 (2d Cir. 1974) (cartons of tinned hams inside the container were the "package"). Baby Togs, Inc. v. S.S. American Ming, 1975 A.M.C. 2012 (S.D.N.Y. 1975).

86. Matsushita Electris v. S.S. Aegis Spirit, 414 F. Supp. 894, 906 (W.D. Wash. 1976).

87. Judge Beeks cited a Ninth Circuit decision as support for this approach. Hartford Fire Ins. Co. v. Pacific Far East Lines, 491 F.2d 960, 963 (9th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974) (a free standing transformer attached to a ski was not a package, so applied the unit rule). Judge Beeks cites approvingly the article by DeOrchis. DeOrchis criticizes the "functional economics test," and notes that the court in *Kulmerland* overlooked the fact that a carrier, when it receives a container, usually has no way of knowing how the goods inside the sealed container are packed and will not be able to predict its own liability. DeOrchis, *supra* note 77, at 257. Contrarily, Judge Oakes rebuts DeOrchis' criticism, saying that the carrier can find out how the goods are packed by having its agents present at each container stuffing or by requiring greater specificity in the bill of lading. Cameco v. S.S. American Legion, 514 F.2d 1291, 1299 (2d Cir. 1974). DeOrchis also notes that in order to get the benefit of the $500 limitation the shipper would have to pack each unit in an export type package which would generate waste. In general, DeOrchis favors the *Standard Electrica* approach of allowing the parties to define what they consider a package in the bill of lading. (DeOrchis, *supra* note 77, at 257).

88. Matsushita Elecris v. S.S. Aegis Spirit, 414 F. Supp. 894, 907 (W.D. Wash. 1976). In *Matsushita*, the carrier provided the container but this rationale should also apply if the shipper provides the container.

of the statute that controls."[89] He claimed the parties' power to "christen something a package" makes the liability floor "illusory and negotiable."[90] The "plain, ordinary meaning" test has been applied in two subsequent district court decisions, one in Oregon[91] and one in Virginia.[92]

The Hamburg Rules would eliminate the definitional problem caused by the COGSA package limitation. Decisions considering the package problem have noted the need for legislative action.[93] The Hamburg Rules replace the packages limitation with a package or weight limitation: liability is limited to 835 "units of account" per package or other shipping unit, or 2.5 units of account per kilo,[94] whichever is higher.[95] When the goods are consolidated in a container

89. *Id.* at 905.

90. *Id.*

91. Omark Indus. v. Associated Container Transp. (Australia) Ltd., 420 F. Supp. 139 (D. Ore. 1976) (Beeks, J., sitting by designation). Finding that each pallet was a "package," the court states that it is not the smallest unit that constitutes the "package," rather, it will usually be "the largest individuated unit of packaged cargo made up by or for the shipper . . . ." *Id.* at 142. The court distinguishes the pallet from the container in *Matsushita* saying "the outer packaging of a palletized unit [is] an integral part of the cargo unlike a container . . ." and a pallet does not resemble a "detachable stowage compartment" of the vessel, as does a container. *Id.* at 143.

92. Yeramex International v. Tendo, 1977 A.M.C. 1807 (E.D. Va. 1977).

93. Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291, 1300 (2d Cir. 1974). Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645, 648 (2d Cir. 1973); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 814 (2d Cir. 1971); Standard Electrica, *supra* note 79, at 946-47.

94. Hamburg Rules, *supra* note 27, at art. 6(1):

> (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.
> (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.
> (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

The unit of account is defined in Art. 26 as a Special Drawing Right (SDR) of the International Monetary Fund. For a discussion of the SDR *see* Silard, *Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules*, 10 J. MAR. L. & COM. 13 (1978).

95. Hamburg Rules, *supra* note 27, at art. 6(2):

> For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this article, the following rules apply:
> (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by

or on a pallet, the Hamburg Rules provide that the enumeration found on the bill of lading shall define the "package." The Hamburg Rules thus resolve the package problem to a certain extent in favor of the parties' intent as expressed in the bill of lading.[96] By applying dual limits of valuation, the Hamburg Rules answer Judge Beek's concern over allowing the parties' intent to govern. The Hamburg Rules, therefore, reduce reliance on judicial interpretation of the term "package" and address the modern containerization problem.

B. Himalaya Clause

The Hamburg Rules, in extending the carriers liability limitations to stevedores and other independent contractors, maintain continuity with current law. Under present law, a carrier can extend the protection of its limited liability to the stevedore through the use of what is known as a "Himalaya" clause in the bill of lading. With the exception of the United States, most countries refuse to honor such clauses.[97] While allowing such protection,[98] United States courts have strictly construed "Himalaya" clauses and have denied the stevedore coverage whenever the clause does not clearly provide protection.[99] American

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sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

96. It is arguable that bills of lading are so restricted by other commercial considerations that they do not reflect the parties' actual intent. The resolution may be one in favor of the shipper in most cases, since customs requirements tend to require specificity in shipping documents.

97. Canadian General Electric Co. v. Pickford & Black, [1971] Can. S. Ct. 41 (Canada) Midland Silicones, Ltd. v. Scruttons, Ltd. [1961] 2 Lloyd's List L.R. 365, [1962] A.C. 446 (England, House of Lords); Wilson v. Darling Island Stevedoring Co., [1956] 1 Lloyd's Rep. 346, 364 (Australia High Court). The remainder of this discussion will generally use the term "stevedore" to include both the stevedore who usually loads the goods and the terminal operator.

98. Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d 361 (9th Cir. 1974); Tessler Bros. (B.C.) Ltd. v. Italpacific Line, 494 F.2d 438 (9th Cir. 1974); Bernard Screen Printing Corp. v. Meyer Line, 464 F.2d 934 (2d Cir. 1972), *cert. denied*, 410 U.S. 910 (1971) (clause specifically stated "independent contractors"). Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285 (5th Cir. 1971); Carle & Montanari, Inc. v. American Export Isbrandtsen Lines, Inc., 386 F.2d 839 (2d Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968); Phillips Bros. v. Mitsui OSK Lines Ltd., 1976 A.M.C. 183 (S.D.N.Y. 1974); Michle Co. v. Hapag Lloyd, 1975 A.M.C. 654 (S.D. Tex. 1974).

99. In Cabot Corp. v. S.S. Mormacscan, 441 F.2d 476 (2d Cir. 1971), *cert. denied*, 404 U.S. 685 (1971), the court denied the stevedore the benefit of the limitation because the bill of lading did not contain the required "clarity of language." Although clause 13 of the bill

courts have also denied protection when the clause appeared too broad in its coverage.[100]

The Hamburg Rules attempt to extend the same protection by law.[101] The carrier's defenses and liability limitations are extended to "servants or agents" of the carrier acting within the scope of their employment.[102] The legislative history suggests that a stevedore is a "servant or agent" of the carrier.[103]

While such protection is assured under the Hamburg Rules within the "tackle to tackle" period, coverage after discharge from the vessel is less clear. Article 4 of the Rules, in a complex provision,[104] purports to

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of lading provided that the limitation would apply only to the "carrier," clause 2 defined "carrier" to include "all persons rendering service in performance of this contract." *Id.* at 478. The court said it was not clear whether the term "carrier" in clause 13 meant to incorporate the phrase "all persons rendering service in performance of the contract" from clause 2, or even whether the latter phrase meant to include a stevedore who was loading another shipper's goods (which were dropped on the plaintiff's goods). The court suggested that the term "stevedore" should have been used if that was what the parties intended. *Id.* at 479. *See also* Schiess-Froriep Corp. v. S.S. Finnsailor, 574 F.2d 123, 127 (2d Cir. 1978); Toyomenka, Inc. v. S.S. Tosaharu Maru, 523 F.2d 518 (2d Cir. 1975) (defendant was a guard service hired by the stevedore and the "Himalaya" clause stated "independent contracts . . . used . . . by the carrier"); DeLaval Turbine, Inc. v. West India Industries, Inc., 502 F.2d 259 (3d Cir. 1974); Magnun Marine v. Kenosha Auto Transport Corp., 481 F.2d 933 (5th Cir. 1973); Rupp v. International Terminal Operating Co., 479 F.2d 674 (2d Cir. 1973) (same provision as in Cobalt except the stevedore was handling the shipper's cargo); Hanson & Orth, Inc. v. M/J Jalatarang, 450 F. Supp. 528 (S.D. Georgia 1978).

100. LaSalle Machine Tool, Inc. v. Maher Terminals, Inc., 452 F. Supp. 217 (D. Md. 1978). The clause included "any independent contractor performing services including stevedoring in connection with the goods hereunder." The court found it "so broad as to be unreasonable." *Id.* at 221.

101. Hamburg Rules, *supra* note 27, at art. 7(2). The Hamburg Rules add unnecessary complexity by providing further that the carrier or its servants or agents will be denied the liability limitation if the damage is caused intentionally or recklessly. Hamburg Rules, *supra* note 27, at art. 8.

102. *Id.* art. 7(2).

103. Tetley, Q.C., *The Himalaya Clause—Heresy or Genius*, 9 J. MAR. L. & COM. 111, 127 (1977), Sweeney, *supra* note 3, at 340. This point of view is supported by the fact that the drafters derived the provision from a similar provision in Article 3 of the Brussels Protocol. The Protocol expressly excluded independent contractors in a parenthetical phrase and the phrase was excluded from the draft. Brussels Protocol (Hague-Visby) Art. 3 provides, "If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor) such servant or agent shall be entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under the convention." Sweeney, *supra* note 2, at 340.

104. Article 4(1) of the Hamburg Rules provides that the Hamburg Rules apply while "the carrier is in *charge of the goods* at the port of loading, during the carriage and at the port of discharge". (empahsis added). Article 4(2) defines the period "the carrier is deemed to be in charge of the goods" as:

(a) from the time he has taken over the goods from:
    (i) the shipper or a person acting on his behalf; or

extend coverage before loading and after discharge. Under the Rules' definition of delivery, such protection may be illusory since, strictly construing the provision, the carrier can avoid application of the rules after discharge by declaring in the bill of lading that "delivery" takes place at discharge from tackle to the open wharf.[105]

Article 4 also encourages confusion as to the time of delivery by permitting "usage" of trade to govern in some instances.[106] The cargo owner could invoke trade usage to deny the stevedore the protection of the rules.[107] The extension of protection to the stevedore after discharge is therefore uncertain.[108] Though a more liberal construction of this provision would provide such protection, statutory modification would guarantee consistency.[109] Adoption of the Hamburg Rules with a modified Article 4 should reduce the litigation generated by poor drafting of "Himalaya" clauses.[110] A modified Article 4 would maintain the protection such clauses have historically provided.

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the cosignee does not receive the goods from the carrier, by placing them at the disposal of the consignee *in accordance with the contract* or with the law or with the *usage* of the particular trade, applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over. (emphasis added).

Article 4(3) provides that the terms "carrier" and "consignee" include servants or agents of the carrier or consignee.

105. The clause in Art. 4(2)(b)(ii), "in accordance with the contract", suggests this can be done. It is doubtful that the drafters intended such an escape.

106. *Id.* art. 4(2)(b)(ii).

107. Tetley, *supra* note 103, at 127 (discussing the Uncitral draft which has been modified.) This is important because the carrier could provide for its own exculpation beyond the period covered by the Rules, but would not be able to totally exculpate the stevedore from *all* liability. A clause purporting to do so is void as against sound policy. Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d 361, 373 (9th Cir. 1974).

108. The stevedore may still need the protection of a "Himalaya" clause for this period.

109. The attempted extention of coverage beyond the "tackle to tackle" period provided in Art. 4 of the Hamburg Rules is not unusual. Similar coverage during this period is provided by the Harter Act. Harter Act § 1, 46 U.S.C. § 191 (1976). It is not available, however, under COGSA.

110. The problems suggested could be avoided by the addition of a clear definition of "delivery."

IV. THE CHANGE IN STATUTORY LANGUAGE

An objective assessment of the Hamburg Rules requires an acknowledgment of recent criticism. Criticism focuses chiefly on the changes in statutory language. Writers have lamented the loss of terms of art such as "due diligence" "seaworthiness", "perils of the sea", and "deviation".[111] The replacement of the carrier's duty to exercise "due diligence" with the requirement that the carrier prove "he, his servants or agents took all measures *that could reasonably be required* to avoid the occurrence and its consequences"[112] is frequently mentioned.

Much of this criticism seems unwarranted. Most of these terms originate in the common law and attach to the archaic catalogue of exemptions. The elimination of the catalogue should reduce their importance. Where these terms are still useful in litigating the question of carrier negligence, reference to them will still be available through the common law.

As is true of any new legislation, the new rules will require some refinement by the courts; they are not entirely unambiguous. One example of this ambiguity is the provision extending the application of the rules beyond the tackle to tackle period, which has already been discussed in relation to the "Himalaya" clause above. Another example is the replacement of the standard of "due diligence" with the standard of reasonableness embodied in the words "that could reasonably be required". The meaning of the reasonableness standard will be much litigated, but it is difficult to see how the substantial changes embodied in the new rules can be achieved without some litigation. Even if the rules had retained the concept of "due diligence", the courts would still have to determine its application in situations where the carrier is liable under the new rules but not under the old.[113] Arguing for the retention of archaic rules because the new rules would require courts to define new terms is untenable in light of the number of cases still arising under the old rules.

V. CONCLUSION

The current rules governing carrier liability clearly need updating. Under the present carrier exemptions, allowing the carrier to escape liability for the negligence of its crew runs contrary to modern princi-

111. Diamond, *supra* note 60, at 42.

112. Hamburg Rules, *supra* note 27, at art. 5(1).

113. These situations arise where the navigation or management defense or the fire exemption continue to apply under the old rules.

ples of tort and agency law. Uncertainty in application enhances the argument for abolishing the carrier exemptions. The provisions limiting the carrier's liability are also outdated. Modern containerization requires modern legislation.

In general, the Hamburg Rules provide an appropriate answer to these needs. Though modification to eliminate the provision shifting the burden of proof in fire damage cases and to clarify coverage beyond the "tackle to tackle" period is desirable, the absence of such modification does not warrant rejection of the Hamburg Rules.[114] The Hamburg Rules provide an opportunity to update the law governing carriage of goods, and still retain the uniformity so vital to international shipping.

114. Modification of a multilateral treaty is unlikely since it would probably require reconvening the conference which adopted the treaty. Such reconvening would occur only if an insufficient number of nations ratified the convention.